RECENT AMERICAN DECISIONS.

Supreme Court of California.

BARRETT v. MARKET ST. C. RY. CO.

The rules and regulations of a carrier of passengers must be reasonable, and the carrier must deal in a reasonable manner with the persons carried.

It would be unreasonable for a street railway company to require passengers upon its cars to tender the exact fare charged, and to refuse to make change for notes or coin of a reasonable amount.

The tender of a five dollar gold piece or legal tender note is not unreasonable, and a railway company is bound to supply its conductors with sufficient money to change a coin or note of that denomination.

A distinction as to what is a reasonable tender, exists between railroads, where passengers may pay their fares at a ticket office, and street railways, where they are obliged to pay upon the cars.

Appeal from Superior Court, City and County of San Francisco.

W. H. L. Barnes, for appellant.

Stanley, Stoney & Hayes, for respondent.

PATTERSON, J., November 26, 1889. Action for damages for the forcible ejection of plaintiff from one of defendant's cars. The defense was that the plaintiff had refused to pay his fare, and that, therefore, the defendant was justified in ejecting him. The trial court gave judgment for the plaintiff, and the defendant appeals upon the findings. The material portions of the findings are as follows:

"That while in said car, as such passenger, and when said car was near the corner of Second and Market streets, the conductor in charge of said car, on behalf of the defendant, did, in the course of his employment as such conductor, demand of the plaintiff the payment of the sum of 5 cents, being the legal fare and cost of transportation on said car. That said plaintiff did not have in his possession any coin or currency of the exact value of 5 cents, or any coin of any smaller denomination than a $5 gold-piece, lawful money of the United States, and plaintiff, in response to said demand of said conductor, offered said conductor a $5 gold-piece, and told said conductor to take his (plaintiff's) fare out of said sum of $5. That the conductor refused to accept said $5 gold-piece, informing the plaintiff that he was unable to make change for said $5 gold-piece, and insisted upon the payment to him by the plaintiff of the exact sum of 5 cents, at the same time directing plaintiff if he did not produce and pay said sum of 5 cents to leave the car. That the plaintiff informed the conductor that the $5 gold-piece was the smallest coin he had; that he was willing to pay his fare, but could not furnish the exact amount; and refused to leave the car upon the demand of the conductor. That thereupon the conductor stopped said car, and called the driver to his assistance, and both of them thereupon seized the plaintiff, and, against his protest, opposition, and struggles, forcibly ejected him from said car at the corner

of said Second and Market streets, and in so doing inflicted upon plaintiff various bruises and injuries. * * * And the Court finds from the foregoing facts alone that the plaintiff did not refuse to pay fare for his transportation on said car, and did not insist upon any right, or supposed right, to be transported free of charge, under any circumstances or upon any condition, and that plaintiff was not ejected or put out of said car for a refusal to pay his fare. And as a conclusion of law, from the foregoing facts, the Court finds that the plaintiff is entitled to judgment," etc. It is stipulated by counsel "that, if plaintiff were entitled to damages, $500 was a fair and just estimate thereof."

The question on the merits to which counsel have mainly directed their arguments is whether the passenger was bound to tender the exact fare. It is argued for the appellant, that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time: Civil Code, § 2187. And, so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently, the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry:" Id. § 2169. This duty, like every other which the law imposes, must have a reasonable performance; and we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that on entering a street-car a person should tender the sum of 10 cents? Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was 6¼ cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand, would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of

1878 forbids him to "charge or collect a higher rate than 5 cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at 4¼ cents, and in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a $100 bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. Section 2188 of the Civil Code provides that "a passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier." The question is whether the findings show a refusal to pay,—whether the tender of a $5 gold-piece was sufficient.

It is claimed by appellant that the establishment of the rule contended for by the respondent would lead to great inconvenience, and make it the duty of the carrier of persons for hire in street-cars to provide its conductors with sufficient small coin to do a general exchange business with all passengers; thus requiring the company to intrust, to a class of employes who are usually of no pecuniary responsibility, large sums of money. It is further said, that if the tender of a $5 gold-piece is a tender of the amount actually due, and the conductor is bound to receive it and return $4.95 to the passenger, the same principle would apply to the offer by the passenger of $10 or $20 in gold or currency. With the question of convenience, however, we have nothing to do, except in so far as it bears upon the question whether the amount tendered was a reasonable sum, such as the carrier was bound to accept. It does not follow, if it be established as a rule, that $5 is a reasonable amount to be tendered to a conductor, that $20 or $50

is also a reasonable amount, and must be accepted. The fears of the appellant are based upon the assumption that passengers generally will contumaciously, to avoid the payment of fare, and require the companies to carry them free, offer coin of a large denomination. But these fears, we think, can be safely set aside upon the theory that a question like this will, as is usual, settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well-known fact, that the $5 gold-piece is practically the lowest gold coin in use in this section of the country.

The case upon which the appellant relies, *Fulton* v. *Grand Trunk Ry. Co.* (1858), 17 U. C. Q. B. 428, is not quite in point. In that case the plaintiff had boarded a train of cars without a ticket, and when asked for his fare declined paying it, as he said he had not made up his mind how far he should go. The conductor told him that he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a $20 gold-piece, telling him to take his fare, $1.35, out of it. Under these circumstances, the Court very properly held, that the plaintiff had refused to pay his fare, within the meaning of a statute very much like our own, and that the conductor was justified in refusing to carry him further. The Court said—

"The general practice is for the passengers to pay at the office, and get tickets, * * * and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a $20 gold-piece, for he relies upon receiving tickets from the parties, or, if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances."

A distinction ought to be made, we think, between passengers traveling on steam railroads and those traveling on street railroads. Passengers of the former class are expected to prepare themselves with tickets procured at the regular office established at the station where the trains regularly stop. Horse-cars and cable-cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing, expect to receive tickets for the passage. Judgment and order affirmed.

We concur: FOX, J.; WORKS, J.

As a general rule, in order to constitute a valid tender, the exact amount due must be offered: 17 AMER. LAW REG. 745,749. The debtor cannot tender a bank note or coin for a larger amount than the debt, and require change to be made: *Betterbee* v. *Davis* (1811), 3 Camp. 70; *Robinson* v. *Cook* (1815), 6 Taunt. 336. But while a railway company, by permitting a passenger to board its car without demanding the payment of his fare in advance, actually establishes between itself and him the relation of debtor and creditor, the enforcement of a rule requiring the tender of the exact fare would be impracticable, and such a rule would undoubtedly be pronounced unreasonable by the courts. In *Tarbell* v. *Central Pacific R. R. Co.* (1868), 34 Cal. 616, the passenger tendered the conductor the amount of his fare in United States legal tender notes. The conductor refused to accept them and demanded coin. This not being produced, the passenger was ejected, and subsequently brought suit for damages. Counsel for the railroad company, while admitting that a common carrier is bound to carry all properly behaved persons on payment or tender of their fare, argued that, before the transportation is completed, there is no "debt" within the meaning of the Legal Tender Acts, on the part of the passenger, and that therefore a tender of United States notes was not sufficient and the company was justified in the ejection. In support of this contention they cited the case of *Perry* v. *Washburn* (1862), 20 Cal. 318 (approved by the Supreme Court of the United States in *Lane County* v. *Oregon* (1868), 7 Wall. (74 U. S.) 71, and subsequent cases), where it was held that taxes levied under State authority did not constitute a debt within the meaning of the Legal Tender Acts. But the Court held that "the point that the defendant was not bound to carry the plaintiff because the fare which he offered to pay was in legal tender notes, is not tenable. * * * There being no contract in writing stipulating for coin, we find nothing in the case which takes it out of the operation of the Act of Congress in relation to legal tender notes. Railroad fares are not taxes, and do not fall within the rule in *Perry* v. *Washburn* (*supra*). Whether the defendant could have legally exacted payment in coin before the plaintiff was admitted into the cars and the journey commenced, is a question not involved in this case, and upon which we express no opinion. Having received the plaintiff and proceeded several miles upon the journey, the defendant must be held to have consented to receive in payment of the fare any good and lawful money which the plaintiff might tender, when called upon for payment. The kind of money to be paid had then ceased to be an open question, for the contract was already made and in process of performance."

To the same effect is the recent case of *Morgan* v. *Jersey City & B. Ry. Co.*, decided by the Supreme Court of New Jersey, November 13, 1889. There the passenger tendered a silver coin, worn smooth by use. The conductor refused to accept it, and, upon the passenger declining to tender other money, ejected him from the car. Upon the trial of a suit for damages, the Court instructed the jury as follows: "The plaintiff tendered this ten-cent piece, a genuine and recognizable coin of the United States, and that was his lawful fare, provided that you believe that the coin is in the condition in which it was when issued from the mint, except as it has been changed by proper use. If there has been no other abrasion, no other defacement of that coin, except such as it has received in the passing from hand to hand, then it is still, under the laws of the country, a good ten-

cent piece, and was the fare of the plaintiff. If you think it has been otherwise changed, willfully changed, it has ceased to be a lawful coin of the country, and it has ceased to be a lawful tender." The Supreme Court held this instruction to be substantially correct. The opinion is well worth quoting at length: "By the Act of March 3, 1875 (Rev. Stat. U. S. § 3586), the silver coins of the United States shall be a legal tender, at their nominal value, for any amount, not exceeding five dollars, in any one payment. By the Act of January 9, 1879 (Supp. Rev. Stat. U. S. 488), the holder of any of the silver coins of the United States of smaller denomination than one dollar may, on presentation of the same in sums of twenty dollars, or any multiple thereof, at the office of the Treasurer of the United States, receive therefor lawful money of the United States. Section 3 increases the legal tender of silver coin to the sum of ten dollars, instead of five dollars, under the previous statute. In Section 3585 of the Revised Statutes, the gold coins of the United States are made a legal tender in all payments at their nominal value, when not below the standard weight and limit of tolerance for the single piece; and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight. The limit of toleration for gold coin referred to is found in Sections 3505 and 3511, to be, when reduced in weight by natural abrasion, not more than one-half of one per centum below the standard weight prescribed by law, after a circulation of twenty-years, as shown by the date of coinage, and at a ratable proportion for any period less than twenty years. This particularity in the limitation and allowance as to gold coin is not found in the case of natural abrasion in silver coins. This difference is very noticeable and important in a question of statutory construction and legislative intention. It seems by these statutes that, so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value: *U. S.* v. *Lissner* (1882), U. S. Circ. Crt. D. Mass., 12 Fed. Repr. 840. The coin in question in this case was shown in court to the jury. It does not appear in the evidence to have been so worn that it was light in weight, or not distinguishable as a genuine dime. With no limitation put upon its circulation by the Government, it would seem that none was intended, so long as it was not defaced, cut, or mutilated, and was only made smooth by constant and long-continued handling, while being circulated as part of the national currency. The instruction was right, as the facts appear, and as the jury found them."

In both the cases cited, the relation subsisting between the carrier and the passenger, after the latter had entered the car without pre-payment of his fare, was recognized to be that of creditor and debtor. Consequently the passenger was required to offer to pay his fare in the legal tender of the country, and the carrier, when such a tender was made, was bound to accept it. As has been already stated, a strict application of the rules of tender, would justify the carrier in refusing to accept anything except the exact amount of the fare. But another principle here comes into play and must be recognized. It is this principle which sustains the ruling in the principal case. *Reasonableness* must characterize all the dealings of a common carrier with its passengers. It has the power to make rules and regulations to guide and govern its agents

in the discharge of their duties and for the conduct of passengers while upon its cars or conveyances, but such rules and regulations must be reasonable: Wheeler on Carriers, 130-1-2. "Regulations will be deemed reasonable, which are suitable to enable them (carriers) to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers:" *Commonwealth* v. *Power* (1844), 7 Met. (Mass.) 596; *State* v. *Chovin* (1858), 7 Iowa 204. So also the regulations of the carrier must be enforced in a reasonable manner, and its treatment of its passengers must in all cases be characterized by this same quality of reasonableness. Thus in several cases it has been held that, where a passenger, who has purchased a ticket, but is unable to find it at the moment of the conductor's demand for its production, is entitled to be allowed reasonable time to make search for it: *Maples* v. *New York & N. H. R. R. Co.* (1871), 38 Conn. 557; *Hayes* v. *New York Cent. & H. R. R. R. Co.* (S. Ct. N. Y. 1884), 10 Alb. Law Jour. 469; *International & G. N. R. R. Co.* v. *Wilkes* (1887), 68 Tex. 617.

A passenger who has neither ticket nor money is also entitled to reasonable time in which to borrow the sum needed from other passengers, if he requests to be permitted to do so: *Curl* v. *Chicago, R. I. & P. R. R. Co.* (1884), 63 Iowa 417; *Clark* v. *Wilmington & Weldon R. R. Co.* (1885), 91 N. C. 506.

An interesting case is *Louisville & Nashville R. R. Co.* v. *Garrett* (1881), 8 Lea (Tenn.) 438. The plaintiff had there boarded a train without ticket or money, but having a tax certificate, which he supposed would be accepted for his fare, but which the conductor refused to receive. The latter also refused to allow him to proceed to the next station, where he stated that he could get money. As the conductor was ejecting him, another passenger offered to pay the fare, but the conductor would not accept it. The Court said: "The fact of a party getting on a passenger car for the purpose of travel, of itself creates by operation of law a contract, or the law defines the terms of the contract, the obligations of which bind both parties. On the part of the carrier, among other things, the party is entitled to be carried with the care required by law, at the established rates and with no unnecessary delay. On the part of the passenger, he is bound as the first duty to pay, or offer, or be willing to pay his fare according to such reasonable regulations as may be established by the company. Payment, when demanded, is his duty. The receipt of the compensation is the right of the carrier, and this is a condition precedent, without the performance of which he is not bound to perform the service. * * * The principle is, the carrier is bound to carry, but is entitled to his pay—when this is offered, the law imposes the duty. This being conceded, it seems to follow that * * * if another person offered to pay the fare before ejection from the car, the carrier was bound ro receive it and transport the passenger. It is unimportant to the carrier from whom the money comes. If it is the proper amount, he gets what he is entitled to, and must perform the duty imposed. * * * To test this further, however, suppose a carrier should make a regulation that none but money from the pocket of the passenger himself should be received by conductors on passenger trains, and if money should be offered by a friend to pay a party's fare, it should be rejected, no one could hesitate to say such a regulation would be void as unreasonable, and beyond the power of the company to make. If such a rule could not be

properly made, the act of a conductor in such a case, without a regulation to that effect, cannot be justified. * * * Public policy, the interest and rights of of the public, as well as the known conditions surrounding the business of carrying passengers by railroads in this country, demand that no narrow or technical rules should be prescribed to enable them to exercise any arbitrary authority whatever in the performance of their duties growing out of their relation to the public. On the other hand, every principle of fairness and right demands that the carrier should be sustained in enforcing such reasonable regulations as may by experience be found necessary and proper in the conduct and management of the vast machinery to be administered in carrying on this complicated and responsible business."

Questions as to what is, or is not reasonable, are sometimes determinable by the Court and sometimes by the jury. In the principal case the Court held, as a matter of law, that it would be unreasonable to require a passenger to tender the exact fare and that the carrier must be prepared to furnish change to a reasonable amount, and further that five dollars was such a reasonable amount, so that the tender of a five dollar gold-piece, or note, was reasonable.

In the case referred to in the opinion of the Court (*Fulton* v. *Grand Trunk Ry. Co.* (1858), 17 U. C. Q. B. 428), it was also as a matter of law held, that the tender of a twenty-dollar gold piece in payment of fare amounting to one dollar and twenty-five cents "was not a reasonable offer to pay," requiring, as it did, more than eighteen dollars to be paid back in change. Even the officer attending at the ticket office "might reasonably object to the offer of a twenty-dollar gold piece in order that one dollar and thirty-five cents might be taken out of it. If any or all of the passengers might put him to the trouble of giving back so much change as that it would be impossible that the business could be transacted with the expedition which is necessary, or with proper caution." Much less reasonable would it be to require the conductor to be prepared to make change to such an amount.

Thus, it appears that the question to be determined is recognized in both cases to be, what is reasonable under the circumstances. This is emphasized in the principal case by reference to the fact that this question might have to be answered differently in the case of steam railroads, where fares may be paid at the ticket office, and street railways, where they are payable only upon the cars. While in each of these cases the Court very properly treats the question of reasonableness as one of law, circumstances might be readily conceived which would render the reasonableness of the amount tendered a question of fact, to be submitted to the jury.

In a number of cases the duty of a street railway to deal with its passengers in a reasonable manner, has been recognized and enforced by the courts. In *Hall* v. *Second and Third Sts. P. Ry. Co.* (1883), 14 W. N. C. (Pa.) 242, where a passenger, in handing his fare to the conductor, dropped the coin into the straw upon the floor of the car, the Court held that he was entitled to remain upon the car for a reasonable length of time to search for the coin, before he could be ejected for non-payment of fare. In *Corbett* v. *Twenty-third St. Ry. Co.* (1886), 42 Hun. (N. Y.) 587, the facts were as follows: The passenger, on entering a car which was operated by a driver without a conductor, put into the box used for that purpose five fares for himself and three companions. Upon discovering his mistake and applying to the driver for the restitution of the excessive fare

placed in the box, the driver refused to restore it, alleging that he had no authority to return the fare or correct the mistake, and directed the passenger to repair to the office of the company for his money. During a wordy altercation between the passenger and the driver, which followed the latter's refusal to return the fare, a lady entered the car and delivered her five cents fare to the passenger who placed it in his pocket, and, upon his refusal to deposit it in the box, the driver ejected him from the car and delivered him into the custody of a policeman. A regulation of the company required a passenger thus deprived of his money by his own mistake, to go to the office of the company for reimbursement. The Court held that "the plaintiff was clearly entitled to a restitution of the money deposited by him by mistake in the box placed in the car to receive the fare of the passengers, and, as the driver himself was not authorized to return the fare, and in that manner correct the mistake, it was an entirely reasonable course to adopt for the plaintiff to receive the fare, which he did of the other passenger, and in that manner reimburse himself for the money inadvertently placed in the box. The regulation of the railway company requiring a passenger, who may be deprived of his money by his own mistake in this manner, to go to the office of the company for its reimbursement and the correction of the mistake, is entirely unreasonable. * * * As long as the company does not authorize the driver himself to rectify the mistake, it is no more than reasonable that the passenger should be at liberty to do so by receiving, for that purpose, the fare of any passenger afterwards entering the car."

In the case of *Morris* v. *Atlantic Ave. R. R. Co.* (1889), 116 N. Y. 552, a rule of the company imposing an extra charge for packages brought upon its cars and "too large to be carried on the lap of the passenger without incommoding others," was considered. The Court say: "For the successful operation of the road, and for the accommodation and comfort of its passengers, certain regulations are evidently essential. The one in question was reasonable, but that portion of it relating to the present case is indefinite in so far that it does not in terms furnish all the information necessary to its execution, which is dependent upon the fact that the package is too large to be carried in the lap of the passenger without incommoding others. A package may be such and so large as to require the conclusion that it is within the rule, which entitles the company to demand the increased fare, and in such case the Court might, as matter of law, so determine. When it does not necessarily so appear, the question arising, in that respect, becomes one of fact to be otherwise disposed of. In the present case * * * the question was for the jury to determine whether the extent of the plaintiff's package was such as to be embraced within the meaning of the regulation."

It has been frequently decided that the conductor of a street car has the power to expel a passenger whose condition and conduct, either by reason of intoxication or other cause, are "such as to give a reasonable ground of belief that his presence and continuance in the vehicle would create inconvenience and disturbance and cause discomfort and annoyance to other passengers:" *Vinton* v. *Middlesex R. R. Co.* (1865), 11 Allen (Mass.) 304; *Murphy* v. *Union Ry. Co.* (1875), 118 Mass. 228; *Lemont* v. *Washington & G. R. R. Co.* (1881), 1 Mack. (D. C.) 180. In the last mentioned case the Court held that a passenger in a street railway car, who is unable to sit up and is sick to vomiting, may lawfully be expelled, whether his sickness proceed from drunkenness or

not. "Where the circumstances are of such a striking character as to give rise to a reasonable and honest apprehension of disorder and annoyances from he conduct and condition of a passenger, the conductor may exercise his authority and exclude the offender, in order to maintain the peace and order of the vehicle intact. It is evident that the police of horse railway cars, in order to be efficient, must be preventive as well as retroactive, and this can only be done by allowing the conductor to exercise a reasonable discretion in order to prevent acts of impropriety or violence, when they are likely to occur. A homicidal lunatic, or a notorious thief, may be ejected, although they have neither slain nor robbed a passenger, if there is reasonable fear of danger. * * * The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised, except in cases where it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if admitted into a public vehicle or allowed to remain. * * * Thus we see that reasonable and probable cause will authorize the carrier or his agents in the business to exercise the right of exclusion in a proper case, where a breach of good order might reasonably be apprehended. * * * Of course, for an abuse of this discretion or for any oppression in its exercise, the company would be responsible."

In *Conolly* v. *Crescent City R. R. Co.* (1888), 41 La. An. 57; S. C. 28 AMER. LAW REG. 255, the passenger entered the car perfectly sober and well-behaved. While on the car, he was stricken with apoplexy, accompanied with severe vomiting, which occasioned serious discomfort and inconvenience to other passengers. He attempted to leave the car, but fell upon the floor, where he remained helpless, speechless, and incapable of taking any care of himself. The driver, assisted by a passenger, then removed him from the car and laid him in the street between the car-track and gutter. It was a bleak, drizzling December day, but the driver took no steps to secure the sick man any relief or assistance. He simply left him there, and went his way. The passenger remained exposed to the weather for more than four hours, when the police authorities removed him to the City Hospital, where he died the following morning. In affirming a judgment for damages against the railway company, the Court said: "When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus if he had cholera, or small-pox, or delirium tremens, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier in protection of the latter's privileges to exclude him, would undoubtedly arise. Such is the reasonable doctrine of the cases cited. * * * But none of these cases hold that this right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

The same rule of care must be observed in the ejection of a passenger who is intoxicated: *Converse* v. *Washington & G. R. R. Co.* (1876), 2 Mac Ar. (D. C.) 504; or where the person is ejected for non-payment of fare: *Healey* v. *City P. R. R. Co.* (1875), 28

Ohio St. 23. In *Murphy* v. *Union Ry. Co.* (1875), 118 Mass. 228, the Court held that "it could not be said as matter of law that it would be a wrongful act to attempt to eject a person, who might otherwise be lawfully ejected, merely because the car was in motion. Whether it would be so or not, would be a question of fact, to be determined by the jury in view of the rate of speed at which the car was moving, as well as the other circumstances."

As already stated, questions as to what is or what is not reasonable in the rules or conduct of carriers of passengers, are sometimes determinable by the Court and sometimes by the jury. But the cases on this branch of the subject are not uniform and it is not possible to lay down an absolute rule. In *Day* v. *Owen* (1858), 5 Mich. 520, a case frequently cited and followed, the Court say: "The reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the Court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively." The question in that case was as to the reasonableness of a rule of a steamboat line, excluding colored persons from the cabins of its boats.

The other extreme is found in the views of the Court in *South Florida R. R. Co.* v. *Rhoads*, S. Ct. Fla., Jan 18, 1889, where it is said: "The reasonableness of rules prescribed by railroad companies, and like corporations with like powers, is a question of law to be decided by the courts, and not a question of fact to be decided by juries." The rule there sought to be enforced was a peculiar one, forbidding the employes of a competing line of steamboats from wearing their uniform caps or badges upon the cars of the railroad company. The Court held such rule unreasonable, saying that "railroad companies have no right to prescribe the dress of any passenger."

In each of these cases, the rule is unquestionably stated too broadly. There can be no doubt that, in the majority of instances, the Court must pass upon the reasonableness of the rule or regulation in dispute. But this is not invariably the case. Circumstances may be shown which render it eminently proper that the question of reasonableness should be submitted to the jury. It may, morever, be reasonable to enforce a rule at one time, and unreasonable at another. The manner in which the rule is applied, may also affect the question of reasonableness. And in the large number of controversies involving the conduct of a carrier's servants in their treatment of passengers, the aid of a jury must often be invoked, for the purpose of determining whether certain actions are, or are not, reasonable under the circumstances shown. How far the Court should go in particular cases in passing upon questions of reasonableness as matter of law, must be determined by the application of those general principles which mark out the dividing line between the respective provinces of the two great co-administrators of the law.

This annotation has been confined, so far as possible, to the narrow questions suggested by the principal case, in their relation to street railways only. A full discussion of the general subject of the right to eject for non-payment of fare will be found in the annotation to the case of *Butler* v. *Manchester S. & L. Ry. Co.* (1888), 28 AMER. LAW REG. 81. JAMES C. SELLERS.